(2)

No. 90-552

In the Supreme Court of the United States

OCTOBER TERM, 1990

OSCAR DIAZ-ALBERTINI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

LOUIS M. FISCHER
Attorney
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether, in the circumstances of this case, the courts below correctly denied petitioner's motion to vacate his sentence under 28 U.S.C. 2255 on the ground that he did not demonstrate cause for his failure to raise his claim on direct appeal of his conviction.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitution and statutes:

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-552

OSCAR DIAZ-ALBERTINI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the court of appeals (Pet. App. A1-A7) is not reported. The prior opinion of the court of appeals affirming petitioner's conviction on direct appeal is reported at 772 F.2d 654.

JURISDICTION

The judgment of the court of appeals was entered on May 2, 1990, and a petition for rehearing was denied on July 18, 1990. Pet. App. A8. The petition for a writ of certiorari was filed on September 27, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of New Mexico, petitioner was convicted of possessing cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to ten years' imprisonment. The court of appeals affirmed. *United States* v. *Diaz-Albertini*, 772 F.2d 654 (10th Cir. 1985), cert. denied, 484 U.S. 822 (1987). In 1989, petitioner moved under 28 U.S.C. 2255 to vacate his sentence on the ground that he had been denied effective assistance of counsel. The district court denied relief, Pet. App. A9-A12, and the court of appeals affirmed, *id.* at A1-A8.

1. The evidence at petitioner's trial, the sufficiency of which is not disputed, showed that petitioner and his wife were driving a station wagon in which cocaine was concealed inside a compartment in the tailgate of the car. The cocaine was discovered after petitioner's car was stopped at a highway roadblock and petitioner consented to a search of the car. 772 F.2d at 655.

2. On the first day of the trial, the court conducted *voir dire* both for that trial and for an unrelated case. During the first *voir dire*, which was for petitioner's trial, the court asked whether any member of the venire was closely associated with someone involved in law enforcement. Paul Chavez, a member of the venire who was ultimately chosen as a juror for petitioner's trial, remained silent in response to that and other questions. After the *voir dire* was completed, petitioner's attorney and his wife's attorney left the courtroom. 772 F.2d at 655.

During *voir dire* for the second trial, Chavez stated in response to a similar question that he had a "close acquaintanceship with the State Police." 84-1818 Gov't C.A. Br. 9.[1] After the second *voir dire* was completed, defense counsel in the second case—the federal public defender—talked to petitioner's counsel outside the courtroom and told him that one of the jurors on the panel for petitioner's case (Chavez) had stated during *voir dire* that he was acquainted with state police officers. Petitioner's counsel testified at a subsequent hearing on the issue that he decided at the time of that conversation to examine the transcript of the second *voir dire* "should we have a conviction." 772 F.2d at 656.

After petitioner was convicted, he moved for a new trial, raising for the first time the question of Chavez's bias. *Ibid.* The district court held an evidentiary hearing on the issue. That hearing established that Chavez was the godfather of one of the children of the state police officer who supervised the roadblock and whose name was mentioned several times during the trial.[2] The hearing also established that, due to the small size of the town in which the roadblock took place, Chavez was acquainted with [redacted] involved in the roadblock, the search, and the arrest. After hearing testimony from petitioner's counsel and the public defender who spoke with petitioner's counsel after the second *voir dire*,[3] the district court held that defense counsel had

[1] "84-1818 Gov't C.A. Br." refers to the government's brief in the Tenth Circuit on the direct appeal of petitioner's conviction.

[2] The officer testified at the suppression hearing, although not at petitioner's trial. 772 F.2d at 656.

[3] The public defender did not recall precisely what she said to petitioner's counsel after the second *voir dire*. She testified that she might have done nothing more than tell him that Chavez had a close acquaintance with the state police in the town, or she might have suggested that petitioner's counsel

notice of the possible problem concerning Chavez before the jury was sworn, and that by failing to raise the claim until after trial, petitioner, through counsel, had knowingly and purposefully waived his right to object to Chavez's presence on the jury. The court therefore denied petitioner's motion for a new trial. It granted the similar motion filed by petitioner's wife, however, because there was no evidence that her attorney had knowledge before trial of the conversation regarding Chavez. 772 F.2d at 656.

3. On direct appeal of his conviction, petitioner, represented by new counsel, acknowledged that a defendant may be held to have waived a claim concerning the composition of the jury if the defendant or defense counsel had knowledge of the basis for such a claim and did not object in a timely manner. 84-1818 Appellant's C.A. Br. 15-17 (citing, *inter alia*, *McDonough Power Equipment, Inc.* v. *Greenwood*, 464 U.S. 548, 550 n.2 (1984)). Petitioner also asserted (84-1818 Appellant's C.A. Br. 17-18) that "there is no question that an attorney of even minimal competence (far less than that which Mr. Clay, [petitioner's] trial counsel, exhibited at trial) would have challenged Chavez for cause had he known of Chavez's relationship with the police officers." Petitioner argued (84-1818 Appellant's C.A. Br. 11-12, 18-23; Reply Br. 4), however, that there was no such waiver here because his trial counsel was preoccupied with preparing his opening statement when he had

do something about the matter or that he might want to get Chavez off the jury. 772 F.2d at 656. Chavez also testified at the hearing. In response to a question by petitioner's counsel whether his relationship with the state police officers would cause any problems about his attitude or state of mind as a juror, he stated: "that wouldn't have bothered me at all." 84-1818 Gov't C.A. Br. 16.

the conversation with the public defender and did not become fully aware of the basis for a bias claim concerning Chavez until after trial.

The court of appeals rejected that argument. It affirmed the district court's factual finding that the public defender told petitioner's attorney that Chavez had stated during the second *voir dire* that he was closely acquainted with state police officers, and it held that, under *McDonough Power Equipment, Inc.* v. *Greenwood*, *supra*, petitioner had waived his right to object to the composition of the jury by not raising the claim in a timely manner. 772 F.2d at 657.[4]

4. a. Petitioner then filed a motion under 28 U.S.C. 2255, represented by the same attorney who represented him on direct appeal. In his Section 2255 motion, petitioner again raised the issue of Chavez's possible bias, this time arguing that his trial counsel had rendered ineffective assistance by waiting to raise the claim until after trial. The district court denied relief. Pet. App. A9-A12. It concluded that the Section 2255 motion was a "transparent attempt to relitigate [petitioner's] underlying juror bias claim, which was rejected on procedural grounds by the Court of Appeals on direct appeal." *Id.* at A11 n.1. The court noted that petitioner was barred from raising the juror-bias claim itself on collateral attack, because his trial counsel's deliberate tactical decision to wait until after trial to raise it failed to satisfy the "cause" prong of the "cause and prejudice" test for obtaining relief on collateral attack on a claim that was not raised at trial. *Id.* at A11 (citing *Reed* v. *Ross*, 468 U.S. 1, 14 (1984), and *United States* v. *Frady*, 456 U.S. 152, 167-168 (1982)).

[4] The court also upheld the validity of the stop and the search of petitioner's automobile. 772 F.2d at 657-659.

The district court held that petitioner's claim of ineffective assistance of trial counsel also was subject to the cause and prejudice test, and that petitioner was barred from raising that claim on collateral attack because he did not raise it on direct appeal of his conviction. Pet. App. A11-A12. The court noted that petitioner is represented in these proceedings under Section 2255 by the same lawyer who represented him on direct appeal, and that "[h]is withholding on direct appeal of [petitioner's] ineffectiveness of trial counsel claim suggests * * * [a] 'tactical decision to forego a procedural opportunity.'" *Id.* at A12 (quoting *Reed* v. *Ross*, 468 U.S. at 14). "As in the case of trial counsel," the district court concluded, "this apparently deliberate withholding of a claim cannot qualify as cause for [petitioner's] procedural default" in failing to raise the ineffective assistance of trial counsel claim on direct appeal. Pet. App. A12.

b. In an unpublished opinion the court of appeals affirmed the district court's denial of relief under 28 U.S.C. 2255, holding that petitioner is procedurally barred from raising his claim of ineffective assistance of trial counsel on collateral attack. Pet. App. A1-A6. The court of appeals reasoned that, in the circumstances of this case, the claim of ineffective assistance of trial counsel should have been raised on direct appeal, because petitioner was represented by new counsel on direct appeal and because appellate counsel had "all the information available to him [that was] necessary to frame a claim for ineffective assistance of counsel"—namely, "the record from the post-trial hearings on the [juror-bias] matter, which included testimony both by the public defender who had alerted [petitioner's] trial counsel to the problem and by trial counsel himself." *Id.* at A5-A6.

Because petitioner had not shown "cause" for his failure to raise the issue on direct appeal in these circumstances, the court held that he is barred from raising it under Section 2255. Pet. App. A6.

Judge McKay concurred in the result. Pet. App. A7. He did not believe that petitioner had waived his ineffective assistance of trial counsel claim, but he would have rejected that claim on the merits under the standards of *Strickland* v. *Washington*, 466 U.S. 668 (1984).

c. Petitioner filed a petition for panel rehearing. On rehearing, petitioner brought to the panel's attention this Court's disposition of the certiorari petition in *Chappell* v. *United States*, 110 S. Ct. 1800 (1990), along with a copy of the government's response to the certiorari petition in that case. In *Chappell*, the Seventh Circuit held that the petitioner was barred, under the "cause and prejudice" test, from raising a claim of ineffective assistance of trial counsel in a motion under Section 2255 because he had been represented by new counsel on direct appeal and therefore could have raised the claim on direct appeal. In response to the certiorari petition in *Chappell*, we informed the Court that it is the position of the United States that claims of ineffective assistance of trial counsel ordinarily should be raised for the first time on collateral attack under Section 2255 rather than on direct appeal. See 89-1040 Br. in Op. 7. We also took the position in *Chappell* that where claims of ineffective assistance of trial counsel are to be raised under Section 2255, a failure to raise such a claim on direct appeal would not constitute a procedural default, and the defendant therefore would not have to establish "cause" for that failure in order to present the claim on collateral

attack. 89-1040 Br. in Opp. 7-8.[5] The Court granted the certiorari petition in *Chappell*, vacated the judgment of the Seventh Circuit, and remanded to that court for further consideration in light of the position taken by the United States in its brief in opposition. 110 S. Ct. 1800.[6]

In this case, without requesting a response from the United States to petitioner's rehearing petition or to his reliance on *Chappell*, the Tenth Circuit panel denied rehearing. Pet. App. A8. Judge McKay stated that he would have granted the petition because he believed the case to be controlled by *Chappell*. Pet. App. A8.

ARGUMENT

Petitioner contends (Pet. 5-9) that, as it did in *Chappell* v. *United States*, 110 S. Ct. 1800 (1990), the Court should grant the petition for a writ of certiorari, vacate the judgment of the court of appeals, and remand the case to the court of appeals for further consideration in light of the position taken

[5] Although we took the position in *Chappell* that claims of ineffective assistance of trial counsel should ordinarily be raised in a motion under 28 U.S.C. 2255, we urged the Court to deny the petition in *Chappell*. While the Seventh Circuit's aproach departed from the general rule in other courts of appeals, the differing methods for considering claims of ineffective assistance of trial counsel did not, in our view, warrant review by this Court, and the petitioner's ineffective assistance claim in *Chappell* itself had in any event been rejected by the district court on the merits in a ruling on a subsequent motion under Section 2255. 89-1040 Br. in Opp. 4-5, 10-12.

[6] We have been informed by the office of the clerk of the Seventh Circuit that *Chappell* is still pending before the panel following the remand from this Court.

by the Solicitor General in *Chappell*. This case differs from *Chappell*, however. Here, a hearing was held in the district court, in connection with petitioner's motion for a new trial, on the circumstances surrounding the actions of trial counsel that form the basis for petitioner's ineffective assistance of counsel claim, and the record therefore would have enabled petitioner's new counsel to raise the issue on direct appeal. We therefore suggest that the Court deny the petition in this case.

1. Section 2255 is limited to constitutional and jurisdictional claims and to those trial errors that result in a miscarriage of justice. See *United States* v. *Addonizio*, 442 U.S. 178, 185 (1979). Section 2255 is not a substitute for a direct appeal. 442 U.S. at 184; *United States* v. *Frady*, 456 U.S. 152, 165 (1982). Accordingly, if a defendant did not raise a claim at trial or on direct appeal, he cannot prevail under Section 2255 unless he shows "cause" for the procedural default at both the trial and appellate levels and substantial prejudice resulting from the error. See *Smith* v. *Murray*, 477 U.S. 527, 533 (1986); *Murray* v. *Carrier*, 477 U.S. 478, 485-486 (1986); *United States* v. *Frady*, 456 U.S. at 167-169; see also *Dugger* v. *Adams*, 489 U.S. 401, 406, 408-410 (1989); *Teague* v. *Lane*, 489 U.S. 288, 297-299 (1989) (plurality opinion).[7]

[7] To demonstrate cause, a defendant ordinarily must show that his default was due to a factor external to the defense, such as the novelty of the claim or interference by the authorities. But if defense counsel's failure to object at trial or to raise an argument on appeal amounted to ineffective assistance of counsel under Sixth Amendment standards, that ineffectiveness constitutes "cause" that excuses a procedural default. *Murray* v. *Carrier*, 477 U.S. at 488.

It has been the government's position for some time that claims of ineffective assistance of trial counsel ordinarily should be raised in the first instance in a motion under Section 2255 rather than on direct appeal. See *United States* v. *Cronic*, 466 U.S. 648, 667 n.42 (1984). There are two reasons for this position: (1) if the same lawyer represented the defendant both at trial and on appeal, it is unrealistic to expect the lawyer to argue on appeal that his own performance at trial was ineffective; and (2) resolution of claims of ineffective assistance of trial counsel often requires consideration of matters that are outside the record on direct appeal and that should be considered by the district court in the first instance. If a claim of ineffective assistance of trial counsel is supposed to be raised on collateral attack under Section 2255, a failure to raise such a claim on direct appeal would not constitute a procedural default. In that event, the defendant need not establish "cause" for that failure in order to present a claim of ineffective assistance of trial counsel in a motion under 28 U.S.C. 2255.

As we pointed out in our brief in opposition (at 8-9) in *Chappell*, most of the courts of appeals have either required or expressed a strong preference that a claim of ineffective assistance of trial counsel be presented to the district court in the first instance, in a motion under Section 2255.[a] As we also pointed out in our brief in opposition (at 10-11) in *Chappell*, however, it would not be unfair for the courts of appeals to require a defendant who is represented by new counsel on appeal to raise any claim of ineffective assistance of trial counsel on direct appeal, and

[a] Petitioner lists (Pet. 7-8) the cases we cited in our brief in opposition in *Chappell*.

for the courts to apply the cause and prejudice test if the defendant does not do so. The courts of appeals would then have the option of either addressing the ineffectiveness issue in the proceedings on direct appeal (with a remand to the district court for the receipt of evidence and factual findings, if necessary) or declining to resolve the issue on direct appeal and remitting the defendant to a motion under Section 2255. Nonetheless, in light of the general position of the United States—and of the courts of appeals—that claims of ineffective assistance of trial counsel should ordinarily be raised in a motion under Section 2255, the Court granted the certiorari petition in *Chappell*, vacated the Seventh Circuit's judgment in that case, and remanded for further consideration in light of the position taken in our brief in opposition. To this extent, the Court's disposition in *Chappell* might suggest a similar disposition here.

2. This case, however, differs from *Chappell* in one important respect. In this case, the district court held a hearing on petitioner's motion for a new trial, which raised the juror-bias issue. Although the hearing did not address the matter specifically in terms of whether trial counsel rendered ineffective assistance under Sixth Amendment standards, it did elicit testimony concerning the circumstances in which trial counsel first learned of the possible juror bias and his explanation for why he did not raise the issue until after petitioner was convicted. The transcript of that hearing—as well as the district court's finding that trial counsel had made a deliberate tactical choice to withhold the juror-bias issue until after trial, and its order granting a new trial to petitioner's wife on the basis of the same claim—were fully available to

petitioner's new counsel on direct appeal. That record would have furnished a basis for counsel to argue that trial counsel had been constitutionally ineffective in not raising the issue prior to trial.

In fact, as we have pointed out (see page 4, *supra*), appellate counsel *did* argue in his brief (at 17-18) on direct appeal that "an attorney of even minimal competence * * * would have challenged Chavez for cause had he known of Chavez's relationship with the police officers," but further argued that trial counsel was not sufficiently aware of that relationship to require him to challenge Chavez before the jury was sworn. Appellate counsel easily could have argued, in the alternative, that if the court of appeals concluded that trial counsel was on notice of the basis for a bias claim concerning Chavez but deliberately chose not to raise it prior to trial, then trial counsel's failure to do so constituted ineffective assistance of counsel. But appellate counsel did not make that argument. To the contrary, he argued (84-1818 Appellant's C.A. Br. 18) that the level of "minimal competence" to which he referred was "far less than that which Mr. Clay, [petitioner's] trial counsel, exhibited at trial." Thus, there is considerable force to the district court's view (Pet. App. A12) that the withholding of an ineffective assistance of counsel claim on direct appeal reflected a deliberate tactical decision by petitioner's new attorney.

Since the district court held a hearing on petitioner's motion for a new trial concerning the circumstances of the underlying juror-bias claim on which petitioner now relies in advancing his ineffective assistance of counsel claim, this case somewhat resembles *United States* v. *Cronic*. There, the Court observed that whatever the soundness as a general matter of the government's position that claims of ineffective assistance of trial counsel should be raised under 28 U.S.C. 2255 rather than on direct appeal, the claim in *Cronic* itself was properly considered by the Tenth Circuit on direct appeal because the defendant had raised it in a motion for a new trial in the district court. 466 U.S. at 667 n.42. The only difference here is that petitioner did not frame the juror-bias issue as a claim of ineffective assistance of counsel, either in the district court or the court of appeals, even though the hearing on his new trial motion fully explored the reasons for trial counsel's decision.

Because the record that was developed in the district court apparently would have been adequate for the court of appeals to address the ineffective assistance of trial counsel claim if petitioner had raised it on direct appeal, and because there was no impediment to petitioner's doing so (since he was represented by new counsel on appeal), the holding by the court below that petitioner is barred from raising his Sixth Amendment claim on collateral attack in the particular circumstances of this case is neither unreasonable nor unfair. The fact that the district court held a hearing on the circumstances surrounding trial counsel's decision also distinguishes this case from *Chappell*.

There is, of course, much to be said for a clear and uniform rule in this area, so that appellate counsel, the government, and the courts will not have to speculate about whether an ineffective assistance claim is properly presented on direct appeal and will not have to draw uncertain lines in proceedings under 28 U.S.C. 2255 in deciding whether the claim *should* have been presented on direct appeal. The general

rule we proposed in *Cronic* and *Chappell*—that claims of ineffective assistance of trial counsel should be raised for the first time in the district court in a motion under Section 2255—serves that purpose.[9] For this reason, we believe on balance that although a defendant in petitioner's position might be fully able as a practical matter to raise his ineffective assistance of trial counsel claim on direct appeal, the preferable result from the perspective of the federal criminal justice system as a whole is that he should not be *required* to do so—and that he therefore need not show cause for failing to do so in order to raise the claim in a motion under Section 2255. However, because we rest that conclusion on the net benefits that would accrue to the criminal justice system as a whole (not on a view that the somewhat different approach taken by the Tenth Circuit was unfair to petitioner) —and because the Tenth Circuit recognized that the cause and prejudice standard need not be satisfied where the defendant did not have a realistic opportunity to raise the ineffective assistance of counsel claim on direct appeal—we do not believe that certiorari is warranted in this case.

At all events, as we stated in our brief in opposition (at 11-12) in *Chappell*, we do not believe that the issue of the appropriate procedures for raising claims of ineffective assistance of trial counsel warrants plenary review at this time. That is especially so in this case, which raises the issue in the unique

[9] Of course, even under this rule, where the ineffective assistance of counsel claim *was* raised, as such, in the trial court in a motion for a new trial, as in *Cronic*, the defendant must preserve that issue on direct appeal. If he does not do so, he must show "cause" in order to resurrect the issue on collateral attack.

context of the district court's having held a hearing on the circumstances surrounding the attorney conduct that now forms the basis for the ineffective assistance of counsel claim. Accordingly, if the Court believes that the ruling below warrants further consideration, we agree with petitioner (Pet. 5, 9) that the appropriate course would be to return the case to the Tenth Circuit for that purpose. The panel below did not request a response by the United States to petitioner's petition for rehearing or his reliance on *Chappell*, and it therefore did not have the benefit of the views of the United States, presented herein, concerning the effect of the disposition of *Chappell* on this case.

CONCLUSION

The petition for a writ of certiorari should be denied. In the alternative, the petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded to the court of appeals for further consideration in light of the views expressed herein.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

LOUIS M. FISCHER
Attorney

DECEMBER 1990

☆ U. S. GOVERNMENT PRINTING OFFICE: 1990 282061 20242